

Federal Energy Regulatory Commission  
Washington, DC 20426

MAY - 4 2017

Re: FOIA No. FY17-59  
Initial Response

**VIA EMAIL AND REGULAR MAIL**

David Rothstein  
Judicial Watch  
425 Third Street, SW  
Suite 800  
Washington, DC 20024  
drothstein@judicialwatch.org

Dear Mr. Rothstein:

This is an initial response to your request dated April 7, 2017 requesting records pursuant to the Freedom of Information Act (FOIA)<sup>1</sup> and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2017). FERC received notice of your request when it received your FOIA complaint filed in the U.S. District Court for the District of Columbia.<sup>2</sup> According to the complaint, Judicial Watch seeks:

1. Any and all records of communications sent to or from FERC Commissioners and/or staff members regarding, concerning or relating to the sniping attack on the 2013 Metcalf Substation electrical facility in California for the period April 16, 2013 through November 30, 2014;
2. Any and all records of communications from January 1, 2013 to November 30, 2014 sent to or from FERC Commissioners and/or staff members regarding, concerning or relating to congressional testimony provided by then-FERC Chairman Jon Wellinghoff about the Metcalf Substation incident; and
3. Any and all records of communications sent to or from FERC Commissioners and/or staff members regarding, concerning or relating to the possible or actual resignation of Jon Wellinghoff as FERC Chairman from April 2014 through November 2014.

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<sup>1</sup> 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

<sup>2</sup> A review of Commissions records did not identify a FOIA request made by Judicial Watch on January 23, 2017 as alleged in your complaint.

A search of the Commission's non-public files has identified a considerable number of documents that may be responsive to your request. Given the amount of Commission staff time required to collect and review the information, we are making an initial determination with additional determinations addressing the remaining documents to follow on a rolling basis.<sup>3</sup> Should you wish to narrow your request, I encourage you to contact FERC.

At this time, staff has reviewed fifty-six documents and this letter constitutes a response regarding those documents. Nineteen records are being released to you in full. The remaining thirty-seven records are being withheld under FOIA Exemption 5, as discussed below.

#### FOIA EXEMPTION 5

An initial review of the documents responsive to your request indicates that they are either intra-agency or inter-agency emails and attachments discussing various matters related to the Metcalf Substation incident and are exempt from disclosure. Such information is purely within the scope of FOIA Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

More precisely, FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege which is at issue here. Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also EPA v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.").

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<sup>3</sup> *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845, 2008 U.S. Dist. LEXIS 107177, \*47 (E.D. Cal. June 20, 2008) (supporting the practice of releasing documents on a rolling basis); *Hinton v. Fed. Bureau of Investigations*, 527 F. Supp. 223, 225 (E.D. Penn. 1981) (concluding that rolling responses preserve the government's right to carefully review material while promoting FOIA's disclosure goals); *see also* U.S. Dept. of Justice, *FOIA Post*, "OIP Guidance: The importance of Good Communication with FOIA requesters," (posted 2010).

To be protected by Exemption 5, agency emails must be both pre-decisional and deliberative.

Twenty-four of the records consist of emails between staff regarding how the Commission should respond to inquiries from various Representatives and Senators about how the Commission is addressing the risk of physical attacks on the bulk power system in the wake of the Metcalf Substation incident. Three records consist of emails among staff discussing draft Congressional testimony by Chairman LaFleur and Nominee Bay regarding physical grid security. Finally, two documents entail emails among Commission staff and staff at the Department of Energy on how to respond to inquiries regarding potential regulatory measures to address grid infrastructure.

Three documents consist of staff notes regarding the Metcalf Substation incident that formed part of a discussion about the Commission's role in grid security efforts. Two documents are draft reports prepared by staff for senior staff regarding physical protection of bulk power infrastructure. And, three records are email discussions among staff discussing the proposed Reliability Standard CIP-041-1, Docket No. RM14-500.

All of these documents are pre-decisional and deliberative. They are non-final, internal discussions about how to respond to certain matters, draft documents, or formed part of the internal dialogue about the Commission's role in promulgating physical security standards. Releasing such material to you would stifle frank discussions among agency staff and could result in confusion by providing reasons and rationales that are not the ultimate reasons for agency action. These documents are classic examples of information protected by Exemption 5 and will not be released to you.

Commission staff will continue to review documents and provide a response to you on a rolling basis for the remaining documents responsive to your request. Staff anticipates that the next rolling response will issue next week.

Because this matter is ongoing under 18 C.F.R. § 388.110(a)(1), your right to appeal this and future determinations concerning your request is preserved until the Commission issues a final determination. Any appeal filed under 18 C.F.R. § 388.110(a)(1) must be in writing, addressed to David Morenoff, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and clearly marked "Freedom of Information Act Appeal." Please also send a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

You also have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using

OGIS services does not affect your right to pursue your appeal. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao". The signature is fluid and cursive, with the first name "Leonard" being more legible than the middle initial "M." and the last name "Tao".

Leonard Tao

Director

Office of External Affairs

Enclosures (19)